LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 14 1968
JOHN F. DAVIS, CLERK

(2427)

IN THE

Supreme Court of the United States

October Term, 1965

No. ~~1027~~ 147

BALDWIN-HALL, INC.,

Petitioner,

v.

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE STATE OF NEW YORK

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Respondent
The Capitol
Albany, New York 12224

RUTH KESSLER TOOH
Acting Solicitor General

JEAN M. COON
Assistant Attorney General

of Counsel

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

CONTENTS.

		PAGE
(1)	The determination of the amount of compensation does not present a constitutional question subject to review by this Court	1
(2)	Decisions below were to the effect that damages were result of circuity of access, not change of grade, and thus, not compensable	3
(3)	Petitioner's constitutional arguments are without foundation	6
	A. The construction of § 99 urged by petitioner does violence to the clear language of that section. Petitioner urges this Court to do that which it claims the Courts below erred in doing	7
	B. The rule that certain economic results of public improvements are not compensable does not constitute a denial of any constitutional rights of the petitioner	8
Conclusion		10

CITATIONS.

CONSTITUTIONS AND STATUTES

United States Constitution Amendment XIV 2
New York Second Class Cities Law, § 99 .....1, 7, 10

CASES

Appleby v. Buffalo, 221 U. S. 524 2
Chicago, B. & Q. R. R. Co. v. Chicago, 166 U. S. 226 . 2
Gilmore v. State of New York, 208 Misc. 427 8
McCoy v. Union Elevated R. R. Co., 247 U. S. 354 ... 2
McGovern v. City of New York, 229 U. S. 363 2
Newman v. Metropolitan Elevated Ry. Co., 118 N. Y. 618 8
Northern Lights Shopping Center v. State of New York, 382 U. S. 826, 15 N. Y. 2d 688 3
Provo Bench Canal Co. v. Tanner, 239 U. S. 323 2
Sauer v. City of New York, 206 U. S. 536, 180 N. Y. 27 3
Selig v. State, 10 N. Y. 2d 34..... 5, 6

IN THE

Supreme Court of the United States

October Term, 1965
No. 1327

BALDWIN-HALL, INC.,
Petitioner,

v.

THE STATE OF NEW YORK,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE STATE OF NEW YORK

(1)

The determination of the amount of compensation does not present a constitutional question subject to review by this Court.

Basically, the questions presented in the petition for certiorari herein relate to an interpretation by New York State Courts of a State statute (Second Class Cities Law, §99) and the relation of a particular factual situation thereto. The most that petitioner alleges is a *mistake* of law or fact in the application of that statute. The question of whether an injury is *damnum absque injuria* or the amount of damages to be paid to an owner by reason of

an act of eminent domain is not a constitutional question (*Chicago, B. & Q. R. R. Co.* v. *Chicago,* 166 U. S. 226, 246 [1897]; *McCoy* v. *Union Elevated R. R. Co.,* 247 U. S. 354, 363 [1918]). "When property is taken by eminent domain * * * there must be something more than an ordinary honest mistake of law in the proceedings for compensation before a party can make out that the State has deprived him of his property unconstitutionally" HOLMES, J., in *McGovern* v. *City of New York,* 229 U. S. 363, 370-371 [1913]). In the instant case, no property of the petitioner was actually taken, a factor which increases the appropriateness of the principle above quoted.

This Court has held that as long as compensation is made or provided for, the determination of the amount of the compensation does not present a substantial Federal question under the due process provision of the Fourteenth Amendment (*Appleby* v. *Buffalo,* 221 U. S. 524, 531-3 [1911] affg. 189 N. Y. 163, 81 N. E. 954 [1907]). In the cited case, the New York Court of Appeals had held in a condemnation proceeding that the condemnee was entitled only to nominal damages.

In *Provo Bench Canal Co.* v. *Tanner,* 239 U. S. 323 (1915), affg. 40 Utah 105, 121 Pac. 584 (1911), this Court held that in eminent domain proceedings an award of one dollar for property taken for an easement did not deprive the owner of his property without due process of law if the State court recognized the right to recover for any substantial damages, but found as a matter of fact that no damage whatever had been shown. In the instant case, all the State Courts recognized that petitioner had a right to recover any damages sustained *directly as a result of a change of grade,* but the Appellate Courts found that the injury sustained, if any, was due to circuity of access, for

which there is no recovery provided by law (Pet'r's Appendix, p. 5a). That injuries may constitutionally not be compensable as a matter of law was decided by this Court in *Sauer* v. *City of New York*, 206 U. S. 536, 547-8 (1907), affg. 180 N. Y. 27, 30-31, 72 N. E. 579 (1904).

In *Northern Lights Shopping Center* v. *State of New York* (15 N. Y. 2d 688, 204 N. E. 2d 134 [1965]), the New York Courts held that damage to claimant's property caused by limitation of access resulting from a combination of the power of eminent domain and the police power was *damnum absque injuria*. Certiorari was denied by this Court on a petition raising questions similar to those presented by the petition herein (382 U. S. 826 [1965]).

(2)

Decisions below were to the effect that damages were result of circuity of access, not change of grade, and thus, not compensable.

Without going into factual issues, at this point, it should be noted that respondent does disagree with some factual statements and conclusions reached therefrom, as they are stated in the petition herein.

The building involved in this case was originally constructed as a warehouse around the year 1900 and had been continuously used for such purposes, by various owners, until claimant's purchase in 1946. The building was purchased for $45,000 in that year and remodeled in subsequent years for more effective adaptation to claimant's business, a wholesale distributorship in electrical fixtures and appliances.

Claimant constructed offices and a salesroom on the first floor and offices on the second floor. About half of the first

floor was devoted to shipping of merchandise and the remaining third, fourth and fifth floors and the basement to storage. The evidence showed that large orders and heavy merchandise were shipped or loaded from a dock on West Belden Avenue and that all merchandise was received on that side of the building. Additionally, customers wanting small orders could get over-the-counter service in the salesroom which had its entrance from Oswego Boulevard, upon which the building fronted. Claimant alleged that these customers were mostly small contractors or contractors who needed a few items in a hurry. While claimant further alleged that these over-the-counter sales were retail, its expert, Groves, revealed the true nature of the business when he correctly referred to this as wholesaling (R. 569).

Although claimant's property fronts on Oswego Boulevard, the peculiar nature of the intersection of the Boulevard and North Salina Street deprived claimant initially of the full advantage of that location. Because of the triangular nature of the intersection, only the southbound lane of Oswego Boulevard passed claimant's property; the northbound lane crossed North Salina Street at the intersection with West Belden Avenue and became a two-way street for the remainder of its length. Claimant's property was separated from North Salina Street by the one lane of Oswego Boulevard and a triangular shrub and grass-covered mall (Pet'r's Ex. 11, p. 6 of Petition).

In 1957, the State commenced construction of the Oswego Boulevard Arterial in the City of Syracuse. In the course of that construction, North Salina Street was depressed and Oswego Boulevard elevated to pass over North Salina. In front of the claimant's building, a southbound ramp was constructed, providing access from West Belden to North Salina.

As a result of the total work, claimant's building concededly no longer fronted at grade on Oswego Boulevard, but rather fronted, substantially above grade, on the access ramp. Also as a consequence of the construction, a railroad team track was removed from the north side of West Belden Avenue, which siding had formerly been available for use by claimant in receiving merchandise. Prior to the construction, some limited parking had been permitted in front of claimant's building; however, the inherent nature of the new road system, separate and apart from the change of grade, eliminated that parking. Thereafter, however, additional parking on the north side of West Belden Avenue became available through the removal of pre-existing buildings and the construction of a municipal parking lot.

The new road system and its resulting traffic pattern also made access to the property more circuitous, but not impossible, or, in fact, unsuitable.

The claim alleged five causes of action for damages from change of grade, *de facto* appropriation of light, air, and access to North Salina Street and Oswego Boulevard, trespass, and negligence in the construction of the highway project (R. 51-56). The preponderance of testimony on behalf of claimant, related, however, to the access to and from the property which remained after the construction.

In testifying to damages of $147,460 (R. 356), claimant's expert, Groves, listed the factors he took into consideration in arriving at his estimate of damages (R. 357-358, 360). It is significant that in two and one-half pages of listing factors involved in the damages, he mentions the street grade or change of grade only three times. However, on the reopening of the trial subsequent to the decision of the New York Court of Appeals in the *Selig* case

(*Selig* v. *State*, 10 N. Y. 2d 34, 176 N. E. 2d 59 [1961]), Groves reversed his emphasis and revised his damage figure to $131,050, or a reduction of only $17,410 (R. 562, 565). The damages which he formerly attributed to circuity and difficulty of access he now attributed to change of grade; the damages from loss of advertising value (view *of* the property) he now attributed to change of grade; the other difficulties inherent in the changed traffic pattern now were due to the magic phrase, "change of grade".

Assuming that the actual economic damage to the property, to which he had testified, constituted legal damages, the State's expert testified to total damages of only $16,950 (R. 472-473).

Substantially, therefore, it is apparent that there was before the Courts below a substantial conflict as to the nature of the injury sustained by the petitioner. The decisions by the Appellate Courts reflect the argument advanced by the State that the damages sustained were not attributable to a change of grade, but rather to the establishment of a limited access highway in front of petitioner's property and that the access remaining on West Belden Avenue was suitable and sufficient for the use to which petitioner's property was put. This factor places this case squarely within the rule of the cases previously cited in this brief and raises no issue which should be reviewed by this Court.

(3)

Petitioner's constitutional arguments are without foundation.

The Petition, herein, also argues that the dismissal of the claim by the Appellate Courts in New York violates the

statutory intent of Second Class Cities Law, §99, and consequently deprives petitioner of property without due process of law and further deprives petitioner of constitutional rights by requiring it to pay more than its just share of the cost of a public improvement. The factual and legal absurdity of these claims can be briefly demonstrated.

A. The construction of § 99 urged by petitioner does violence to the clear language of that section. Petitioner urges this Court to do that which it claims the Courts below erred in doing.

Petitioner correctly stated in the Court below that "A statute must be read and given effect as it is written by the Legislature, not as the Court may think it should or would have been written * * *." Second Class Cities Law, § 99, provides for payment of *compensation for damages done as a result of a change of grade.* Not all damage from new highway construction necessarily results from a change of grade, and the sole fact that the grade has been changed does not entitle a claimant to recover damages otherwise noncompensable where they are not a direct result of a change of grade.

In order to recover compensation, petitioner must have proven two things: (1) that it sustained damages directly resulting from a change of grade and (2) the monetary value of those damages. Proof of the monetary value of damages resulting from noncompensable elements will not suffice as such proof. These elements are simply items of factual proof; they do not involve elements of either statutory or constitutional rights. Simply stated, our position is that petitioner did not prove these elements in this case and, therefore, was not entitled to recover.

However, petitioner now asks this Court to amend § 99 to add damages for circuity and inconvenience of access

and damages for loss of easements of light and air to the damages for change of grade provided in the statute by the New York Legislature. To adopt petitioner's contentions here would involve this Court in the very "judicial legislation" condemned by petitioner in the Court below. The section refers to damages from change of grade and those are the damages which must be proven. Not having proved such damages, petitioner is not entitled to recover here.

B. The rule that certain economic results of public improvements are not compensable does not constitute a denial of any constitutional rights of the petitioner.

The Petition alleges that the doctrine of *damnum absque injuria* compels petitioner to bear more than its fair share of the cost of the improvement. In support of this argument, it cites tax and statutory assessment cases, none of which is here applicable. The same arguments have long since been disposed of in condemnation cases. Claimants in partial-taking cases, where benefits have been offset against damages, have complained that neighbors from whom no property has been taken have not been equally charged for benefits. But the holdings there have been that no constitutional rights have been violated by setoff of benefits (see, for example, *Newman* v. *Metropolitan Elevated Ry. Co.*, 118 N. Y. 618 [1890]; *Gilmore* v. *State*, 208 Misc. 427, 143 N. Y. S. 2d 873 [1955]).

Equally so, no constitutional rights are violated by rules which hold that certain economic results of public improvements are not compensable. As a matter of logic, damages from circuity of access, if recoverable by an owner of property abutting on the improvement as a matter of constitutional right, would also be recoverable by an owner of property a block or more away whose damages differed only in degree.

Even so, petitioner's basic allegation of damage is that while its appraiser alleged a before value of $131,000, claimant sold the building in 1959 for only $41,000, thus sustaining a *prima facie* loss of $57,000. This argument is fallacious at best. The State's appraiser testified that the value before construction was only $51,000 (R. 472), thus the loss would presumably be only $10,000. However, both of these appraisals were based upon land value plus depreciated reproduction cost of the building, not on a market data basis. It may very well be that the sale price of this building was a true indication of the actual market value of the building even before construction. In this regard, certain basic facts should be considered.

Petitioner purchased this property in 1946, immediately subsequent to the conclusion of World War II, and used it as remodeled for a period of over 12 years. During that time, new developments drastically affected the values of warehouse properties on the periphery of the downtown area. The construction of new highways and the dispersement of both industry and retail business to outlying areas considerably lessened the desirability of central city warehouse locations. The significance of this element is amply demonstrated by the fact that on the sale of the Oswego Boulevard Building, petitioner did not buy another warehouse building in the central city area, but rather built a new one-story building in Industrial Park in the suburban Town of Dewitt, where land values approximated only 25¢ a square foot.

The location of petitioner's new building has further significance, in view of the frustrated efforts on trial to prove the true nature of the sale of claimant's building (R. 191-214). Petitioner sold its building to Middle Oak, Inc., a subsidiary corporation of the Pomeroy real estate organization (R. 191-195), for an asserted consideration

of $41,000. However, in conjunction with that sale, the building was leased back to Baldwin-Hall, and also presumably tied in with this sale was petitioner's purchase of land in Industrial Park from Donald Pomeroy. Thus, even petitioner's assertion of economic damage as reflected in its sale price is suspect.

The vacancies in other central city warehousing properties not affected by highway grade changes, the dispersion of industry and commerce from central city areas, and the sheer age of the building itself reflect the basic reasons for its continued vacancy.

Thus, both as a matter of law and fact, petitioner has been deprived of no rights compensable under either the Constitution or Second Class Cities Law, § 99, and no issues are raised which should be reviewed by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: June 2, 1966.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Respondent

RUTH KESSLER TOCH
Acting Solicitor General

JEAN M. COON
Assistant Attorney General

of Counsel